INDEX

TABLE OF AUTHORITIES

CASES:

IN THE

Supreme Court of the United States

October Term, 1966

No. 105

HARRY KEYISHIAN, ET AL., *Appellants*

VS.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, ET AL.

Appeal from the United States District Court for the Western District of New York

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE

The American Association of University Professors appears *amicus*, with consent of all parties, in support of the position advanced by appellants.

INTEREST OF AMICUS

The American Association of University Professors is the national professional organization of teachers and research scholars in all disciplines at accredited colleges and universities in the United States. It has 975 chapters and over 80,000 members in such institutions; it is estimated that such membership constitutes approximately 30% of total full time faculty in accredited institutions of higher learning.

The Association is a joint sponsor, with the Association of American Colleges (the "AAC"), of the 1940 *Statement of Principles on Academic Freedom and Tenure.* This Statement, which has been endorsed by two-score leading professional and educational organizations, seeks to recognize the obligation of the academic community to formulate and apply substantive standards of rights and responsibilities as they relate to academic freedom and its exercise, and the procedural techniques and safeguards for the enforcement of such responsibilities and the protection of such rights.[1] In general, the AAUP has worked both inde-

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[1] The *Statement*, with a list of endorsing organizations, is set forth in the Appendix, together with an implementing 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings*, also jointly formulated and sponsored by AAC and AAUP. For a description of the processes under these statements, their background, and the special role of the Association, see Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, 28 Law & Contemp. Prob. 431, especially 438-440 (1963). See also the annual reports of the Association's Committee A on Academic Freedom and Tenure, usually printed in the summer issue of the *AAUP Bulletin*. For examples of recent reports, based on full academic investigation, of cases under the Statements in which "loyalty" and "subversive" or related types of conduct were in issue, see those on Allen University and Benedict College, 46 A.A.U.P. Bull. 87 (1960), Alabama State College, 47 id. 303

pendently and in cooperation with colleges and universities and with other organizations in seeking the formulation, recognition, and observance of principles and practices indispensable to the sound operation of our colleges and universities in all its aspects.

The interest of the Association in the instant case derives in part from the fact that it involves statutes and related administrative requirements which represent state action directed specifically to, and in the judgment of the Association in derogation of, basic constitutional rights and related protective safeguards of members of the teaching profession.[2]

(1961), Sam Houston State Teachers College, 49 id. 44 (1963), University of Arkansas, 49 id. 344 (1963) (this case is the sequel of *Shelton* v. *Tucker*, 364 U.S. 479 (1960), discussed *infra*), the University of South Florida, 50 id. 44 (1964), Lincoln College (Illinois), 50 id. 244 (1964), and Wayne State College (Nebraska), 50 id. 347 (1964). All except Lincoln College involved in one way or another state legislative or administrative action.

To be noted is that many cases of violation are never the subject of a formal report, because the faculty involved may prefer not to pursue the matter publicly. Likewise, where review by the Association of dismissals or other adverse action against faculty indicates such action was properly taken, such cases would by their very nature not lead to formal investigation or to public reports.

The Fuchs article referred to *supra* is one in a symposium on academic freedom which treats at various points the issues presented by the instant case. See particularly Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 Law & Contemp. Prob. 447; Morris, *Academic Freedom and Loyalty Oaths*, id. 487; Emerson and Haber, *Academic Freedom of the Faculty Member as Citizen*, id. 525; and Joughin, *Academic Due Process*, id. 573.

[2] These issues are of concern as they relate to faculty who teach in public colleges and universities; they are becoming of increasingly greater significance with the growing community dependence on such institutions for higher education and other community needs.

As indicated by the facts of the instant case—the conversion of a private into a public institution—these requirements may also

The preservation and enjoyment of these rights and safeguards are, of course, of fundamental concern for their own sake to faculty, as they are to other citizens. Of much greater concern, however, to the academic community is that these rights and the protections they provide are essential to the integrity of the academic function and for an environment that permits the teacher to seek, transmit, and expand the boundaries of knowledge. Experience has made it altogether too clear that academic freedom and the substantial societal objectives and purposes it serves, are particularly subject to disruptive intrusion and interference—and its own subversion—through "loyalty" oaths, tests, and requirements as exemplified in state statutes and administrative action. This special vulnerability has already been recognized or referred to in various recent decisions and opinions of this Court (e.g. the repressive effect upon the free search and exposition of truth resulting from the very presence of such statutes, their

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have direct implications for faculty in private colleges. Some statutes, as in Massachusetts (Gen. Laws, c. 71, s. 30A), specifically apply to private as well as to public institutions; and there have been examples of state pressure on private schools. See, e.g. *Academic Freedom and Tenure: Allen University and Benedict College,* 46 A.A.U.P. Bull. 87 (1960), where such pressure was based on the power of the state with respect to teacher certification; in this case faculty were dismissed because of their views and activities in behalf of racial integration and alleged Communist affiliation. The case is discussed in [Fuchs,] *The Association and the Desegregation Controversy,* 48 A.A.U.P. Bull. 167, 168-169 (1962).

Further, teachers in private as well as public colleges and universities must, if they are to retain a full sense of freedom of opportunity for professional advancement or mobility in general, act in appreciation of the growing importance of the state supported institution in higher education. Also involved for them are appointments to advisory or other Governmental commissions or posts. See in this connection the outstanding statement of Professor Bentley Glass on *Test Oaths,* 46 A.A.U.P. Bull. 290 (1960), relating to an appointment to the Maryland State Radiation Control Advisory Board.

extensiveness and variety, and the often openly stated threat of their misuse.[3] It derives further from the expansion in many instances, as indicated by the facts in at least one recent case before the Court, of the concept and scope of "loyalty" and "subversion" so as to relate them to regard or respect for local community attitudes and mores.[4]

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[3] These cases are discussed in the body of the brief. The manner in which "loyalty" and "subversive" provisions and administrative action may operate *in terrorem* has been discussed and analysed in a number of writings, see e.g. Machlup, *On Some Misconceptions Concerning Academic Freedom*, 41 A.A.U.P. Bull. 753, 756, 760, 772-784 (1955), and especially Morris, *Academic Freedom and Loyalty Oaths*, 28 Law & Contemp. Prob. 487, particularly 496-502 (1963). The footnote treatment in the Morris article identifies much of the significant literature on the topic. See also his companion article, *The University of Washington Loyalty Oath Case*, 50 A.A.U.P. Bull. 221 (1964).

[4] *Shelton* v. *Tucker*, 364 U.S. 479 (1960). The statute in this case, which required annual filing of affidavits as to associational membership and contributions, was shortly followed by one barring employment in public schools and colleges of members of the National Association for the Advancement of Colored People. The preamble of this act set forth a finding of the Special Education Committee of the Arkansas Legislative Council that the NAACP was a captive of the international Communist conspiracy. See Arkansas Statutes Annotated, Section 12-2335-38 (1959 Supplement), *Carr* v. *Young*, 106 Ark. 139, 331 S.W. 701 (1960), and *Shelton* v. *McKinley*, 174 F. Supp. 351 (E.D. Ark. 1959). The Federal Court in the latter case declared this statute unconstitutional; the State did not appeal from this holding. See also the Allen University and Benedict College cases, discussed *supra*, note 2, and *Academic Freedom and Tenure: Alabama State College*, 47 A.A.U.P. Bull. 303, 306 (1961).

For examples of the role and effect of local community attitudes on termination of faculty appointment in a general political context, see the reports on Sam Houston State College, Wayne State College, and Lincoln College, cited *supra* in note 1.

See as to both aspects Commager, *The Nature of Academic Freedom*, Saturday Review, August 27, 1966, 13.

Various other factors add to faculty and *amicus* concern. As suggested by initial developments in the instant case, the threat of prosecution or risk of dismissal constitute only several of a broad spectrum of possible intimidating and repressive measures. Often, these other measures are themselves of an affirmative nature. Often, however, they take the more insidious form of administrative non-action injurious to the faculty member;[5] implicated here as well are the corollary subtle constraints on administering university officials that develop where non-action rather than action on the one hand, and external and powerful public or community pressures on the other, are involved, and the attendant difficulties in any case as to proof and in providing due process in any significant sense of the term. There is further the peculiarly severe penalty of general loss of professional opportunity or occupation itself that teachers must pay or risk where

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[5] "A scholar who, through his writing, speeches, or lectures, offends the sensibilities of others—his colleagues, department chairmen, university authorities, interest groups, or large parts of the community—may thereby jeopardize the realization of several of his claims and prospects. Among those may be reappointment in a non-permanent position, promotion to a better position, an increase in his salary, the maintenance of his salary, a moderate teaching load, approval of his course offerings, security clearance for access to documents important for his research, [as well as] undisturbed privacy, freedom from harassment and vilification, freedom from hostile investigation expensive of money, time, and nervous energy." Machlup, *On Some Misconceptions Concerning Academic Freedom*, 41 A.A.U.P. Bull. 753, 760 (1955).

To this list may be added the matter of initial appointment opportunities in other institutions.

charges or adverse action based on "loyalty" or "subversion" occur.[6]

The pervasive extent and effect of official or other repressive proscriptions emanating from outside the academic community have recently been indicated by the risks for faculty even in utilizing ordinary judicial processes to protect their constitutional rights, or perhaps more accurately their academic obligations. An illuminating example concerns the aftermath of a decision of this Court: A period of over five years proved necessary following *Shelton* v. *Tucker* in 1960 before any college or university faculty in a neighboring state having a statute of the same scope and effect as that struck down in that case, found it appropriate to bring suit to challenge the continued enforcement of the statute in that state.[7] Finally, the Association refers,

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[6] "More than in most other occupations, the dismissal of a professor jeopardizes or destroys his eligibility for another position in his occupation. The occupational work of the vast majority of people is largely independent of their thought and speech. The professor's work *consists* of his thought and speech. If he loses his position for what he writes or says, he will, as a rule, have to leave his profession, and may no longer be able effectively to question and challenge accepted doctrines or effectively to defend challenged doctrines. And if *some* professors lose their positions for what they write or say, the effect on many other professors will be such that their usefulness to their students and to society will be gravely reduced." Machlup, *On Some Misconceptions Concerning Academic Freedom*, 41 A.A.U.P. Bull. 753, 756 (1955).

[7] See [Fuchs,] *The Association and the Desegregation Controversy*, 48 A.A.U.P. Bull. 167, 169 (1962). Suit was finally instituted in July, 1966. *Mississippi State Conference of the A.A.U.P.* v. *Holmes*, (N. D. Miss. WC 6625). In Arkansas itself, the state whose statute was struck down in *Shelton*, the teachers who, pending the outcome of the suit, did not file affidavits, were in fact not reinstated. See *Academic Freedom and Tenure: University of Arkansas*, 49 A.A.U.P. Bull. 344 (1963).

In the instant case, it is noted that only four members of the entire faculty of the University of Buffalo refused to sign the

as a basis for its interest and concern, to the disruptive results within individual institutions and in their relationship with the general community caused by statutes and administrative action of an intrusive nature, with unfortunate consequences to education.[8]

In summary, the interest of the Association relates to the protection of fundamental constitutional rights and freedoms of teachers as citizens. It is based, still more importantly, on the threat proscriptions of the kind involved in this case present to vital societal objectives and needs which our colleges and universities exist to serve. This brief relates to both considerations.

STATEMENT AS TO FACTS

For a statement of the case, including the statutory and administrative provisions involved, reference is made to the briefs of the parties.

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certificate initially required, although as indicated by formal resolution of the local chapter of the Association and other statements of protest, a significant portion of the faculty objected to it. (Record, pp. 18, 27-29).

[8] For an example of such disruptive effect, see the statement of Chancellor Paul F. Sharp of the University of North Carolina in summarizing the consequences of the speaker-ban law of that state. Carter, *Speaker Ban: North Carolina Law Stirs Unrest at University, (I) and (II)*, 29 Science 589, 589-590, and 29 id. 725 (1965). An example in the context of loyalty requirements was the loyalty oath crisis some years ago at the University of California. In this connection Stewart, The Year of the Oath (1950). Storowitz, The Fundamental Issue, Documents and Marginal Notes on the University of California Loyalty Oath (1950); and Caughey, In Clear and Present Danger (1958).

QUESTIONS DISCUSSED BY AMICUS, AND SUMMARY OF ARGUMENT

Amicus curiae will contend that the Feinberg Law and its administrative machinery seriously abridge academic freedom. Initially it appears that the Feinberg Law differs in two respects from other state loyalty provisions which have recently come before this Court. First, the Feinberg Law has been held constitutional on its face, at least in substantial part, in *Adler* v. *Board of Education,* 342 U.S. 485 (1952). Since the time of the *Adler* decision, however, important changes have been made in the Feinberg Law which require careful reconsideration of the constitutional issues. Moreover, the applicable constitutional law has changed significantly since 1952, and for this reason too the *Adler* case must be reconsidered. The second difference is less important: The Feinberg Law, unlike most state loyalty provisions, requires neither a disclaimer of disloyalty nor an affirmation of loyalty. This formal distinction makes, however, no difference of substance to the underlying constitutional questions. For the basic purpose and effect of the Feinberg Law are identical to those of other loyalty arrangements of more conventional types: to disqualify certain persons from academic positions solely on the basis of their political views, activities and associations. It is the fact and effect of such disqualification, rather than the form or procedure by which it is imposed, that seriously jeopardizes academic freedom.

This brief will raise four central contentions: First, that major substantive changes in the Feinberg Law, and the quite different factual posture of the present case, require reconsideration of the *Adler* decision; second, that the rapid development of constitutional protection for public employees—especially through

the expansion of the doctrine of "unconstitutional conditions"—removes the main legal premise of *Adler;* third, that the Feinberg Law uses the test of loyalty (or the badge of suspected disloyalty) in several respects that are no longer constitutionally permissible under recent decisions of this Court; and fourth, that the Feinberg Law involves an unconstitutional bill of attainder. Throughout the brief our concern will be with the effect of the Feinberg Law upon the liberty of the academic community, to which this Court has recently accorded very substantial protection.

Because of the changes in both law and fact since 1952, it might well be sufficient to distinguish the *Adler* decision. This brief will, however, go further than to urge merely distinction. While we do not contend that disloyalty may never disqualify public school and college teachers, we contend that the means which New York has chosen for this purpose fail significantly to meet the modern constitutional standards. Thus we respectfully urge this Court to recognize the pervasive unsoundness of *Adler* by overruling that case.

ARGUMENT

Structure and Operation of the Feinberg Law. We are concerned here with the constitutionality of two sets of New York statutory provisions: Sections 3021 and 3022 of the Education Law; and section 105 of the Civil Service Law. Section 105 declares ineligible for public employment in civil service and academic positions all persons who advocate the overthrow of the government by force and violence. The disqualification is elaborated in several subsections which form the heart of the statute. A person is ineligible, *inter alia,* if he (a) advocates, advises or teaches, orally or in writing "the doctrine that the government of the United States or of any political subdivision thereof

should be overthrown or overturned by force, violence, or any unlawful means;" (b) if he "prints, publishes, edits, issues or sells any book" or other document which contains, advocates, advises or teaches the doctrine of violent overthrow (and personally "advocates, advises, teaches, or embraces the duty, necessity, or propriety of adopting the doctrine contained therein;") or (c) "organizes or helps to organize or become a member of any society or group of persons which teaches or advocates that the government of the United States or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means." Under this section, membership in the Communist Party of the United States or of the State of New York constitutes *prima facie* evidence of disqualification.

Another part of section 105, recently added, provides for the removal of any covered employee for "the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts. . . ." The key words "treasonable" and "seditious" are defined by reference to appropriate sections of the Penal Law. The definition of "treasonable" raises no special problems. The definition of "seditious", however, draws in question the Penal Law provisions proscribing criminal anarchy; "sedition" is equated with "criminal anarchy" for these purposes. Penal Law section 160 defines criminal anarchy as the "doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means." In addition, the reference to the Penal Law appears to invoke section 161, which defines and proscribes *advocacy* of criminal anarchy. That section

prohibits numerous acts, including advocating, advising or teaching "the duty, necessity or propriety of overthrowing or overturning organized government by force or violence" or by assassination. In addition, this section imposes criminal liability on any person who:

> 2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or
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> 3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or for any civilized nation having an organized government, because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or
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> 4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

The heart of the Feinberg Law consists of Education Law sections 3021 and 3022, and various regulations which implement those sections. Section 3021 provides briefly that any school administrator or teacher shall be removed from his position "for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position." Unlike the Civil Service Law provision, this section neither refers to

the Penal Law for a definition of the operative terms, nor contains within itself any further language which might offer a definition.

Section 3021 is followed by section 3022, which deals generally with "elimination of subversive persons from the public school system." This section directs the regents of the state university system to adopt certain procedures for the removal and disqualification of any school personnel who violate section 3021 or who are ineligible under section 105. The regents are to hold a hearing and compile a list of organizations which they find to be subversive (on the ground of advocacy or teaching of the violent overthrow of the Government). The regents must provide that membership in any listed organization shall constitute *prima facie* evidence of disqualification for appointment, or for retention in the state educational system. Finally, the regents are directed to prepare annual reports certifying their compliance with this section, and describing the methods used to ensure such compliance.

Pursuant to these statutes, the regents adopted a new set of regulations in the summer of 1949. These regulations require the adoption and implementation of certain local procedures to ensure compliance with the Civil Service and Education Law sections concerned with the employment of "subversives." Prior to the employment of any person, the nominating official must inquire of his former employers and other persons to determine whether the applicant is known to have violated any of the pertinent statutory provisions. Any such violation renders the applicant ineligible for the position. Each year the school officials must prepare a report on each covered employee, stat-

ing whether there is any evidence of violation of any of the pertinent statutes, including evidence of membership in any of the listed organizations. If such evidence is disclosed, the reporting official shall recommend the employee's dismissal, and within 90 days thereafter, the school officials must either prefer formal charges or reject the recommendation. Where the school authorities determine that the evidence indicates a violation, they shall immediately commence dismissal proceedings (according to various procedures detailed in this statute).

In 1953, after holding the requisite hearing, the regents determined that the Communist Party of the United States and of the State of New York were "subversive organizations", and listed them accordingly. Three years later the regents adopted the "Feinberg certificate", which required a declaration by each new applicant that he had read the Regents Rules; that he understood these Rules and the statutes cited therein constituted the terms of his employment; and that he was not now a member of the Communist Party—or that if he ever had been a member, he had communicated that fact to the President of the University. (Such certificates were not required, of course, of members of the University of Buffalo faculty until 1962, the year in which that institution became a part of the State University system.)

In June 1965, after the commencement of this case, the Trustees of the State University of New York substantially revised the procedure. The Feinberg certificate was no longer required of new applicants. It was further provided that no person previously employed would be deemed ineligible for continued employment "solely" because he refused to execute

the certificate. In lieu of the certificate, the Trustees now provided that each applicant should be informed before assuming his duties that the applicable loyalty-security statutes (sections 3021, 3022 and 105, *supra*) constituted part of his contract. He was particularly to be informed of the disqualification which accompanied membership in the listed organizations. The 1965 announcement further provides: "Should any question arise in the course of such inquiry such candidate may request or such officer may require a personal interview. Refusal of a candidate to answer any question relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment." Finally, the new regulations added that the fact of appointment or recommendation attested that "due inquiry has been made and that [the appointing officer] finds no reason to believe that the candidate is disqualified for the appointment." Shortly after the adoption of these new procedures, a brochure was prepared for the benefit of new applicants; the brochure outlines and explains briefly the legal effect of the pertinent statutes. It also invites any prospective employee who may have any question about possible disqualification to request an interview. The covering announcement concludes that "a prospective appointee who does not believe himself disqualified need take no affirmative action. No disclaimer oath is required." (New York law still requires a standard oath of allegiance of all new state employees; no constitutional questions concerning that oath are raised by this case.)

Despite the change in procedure, the substance of the statutory complex has been altered in no respect. Neither court nor legislature has narrowed or clarified the text of the many, uncertainly related, provisions. Nor has the administrative action of 1965

relaxed or dispensed with the application of any of these provisions to any state college or university teacher in New York. The regents remain, of course, at liberty to revive the old certificate procedure at any time—or even to promulgate a new and yet more onerous procedure for testing loyalty. Thus the change in procedure in no way moots any of the constitutional issues posed by the statute, nor does it reduce the urgency of their resolution.

I. MAJOR CHANGES IN THE PROVISIONS OF THE FEINBERG LAW, AND IMPORTANT FACTUAL DIFFERENCES, REQUIRE THE RECONSIDERATION OF ADLER v. BOARD OF EDUCATION.

Although some of the same constitutional questions are raised here as were considered in *Adler* v. *Board of Education,* both the legal context and the factual background of the cases are vitally different. Thus we contend that the resolution of the constitutional issues in *Adler* should not govern this case. Quite apart from the more basic question whether *Adler* should be overruled, which we shall consider *infra,* we contend that *Adler* can be readily distinguished because of these differences between the two cases.

First, the present case implicates a major provision of the Feinberg Law that was on the books in 1952, but not considered by the *Adler* Court. Education Law section 3021 requires the removal of all public school and college employees who have uttered "treasonable or seditious words" or have done "treasonable or seditious acts." Neither term is defined in that section, nor by reference to any other statute. The constitutionality of that section is before this Court for the first time; the *Adler* Court dismissed argument about the provision because "the constitutionality of this

section was not attacked in the proceedings below." 342 U.S. at 489.

A second important difference derives from the 1958 inclusion of Civil Service Law section 105(3) in the Feinberg complex. It is that section which requires, like Education Law section 3021, the removal of persons who utter "treasonable or seditious words" or commit "treasonable or seditious acts." The principal difference is that this provision defines the key terms by reference to Penal Law §§ 160 and 161, dealing with "criminal anarchy," and other provisions defining treason. The reference and attempted specificity are, as we shall see below, quite deceptive, for the attempt to particularize the terms "seditious words" and "seditious acts" has only added a new level of ambiguity to an already imprecise law. Moreover, this amendment applies only to the new section itself; there has been no attempt to define the same words in the older Education Law section 3021.

A third difference involves the specific focus of the present Feinberg Law upon the Communist Party. As the law stood in 1952, it merely directed the regents to investigate and to list any organization which they determined to be subversive. No such proceeding had then been undertaken. No applicant was required to disclaim or renounce membership in any particular organization. Since that time, not only has a regental investigation been held, resulting in the specific listing of the Communist Parties of the United States and of New York. In addition, largely on the strength of the regental determination, the legislature has woven the Communist proscription into the very fabric of the statute. This legislative action thus effectively supersedes the regental proscription. Although

no other organizations have been so listed, the possibility of further regental investigation remains open under the law.

The remaining differences concern the constitutional interests of the plaintiffs and the manner in which the constitutional questions are presented to this Court. For one, the particular academic freedom interests of *college and university professors* in New York are presented here for the first time. This is so in part because the teacher-plaintiffs in *Adler* were employed only in secondary school positions. More important, the statute was extended to cover college and university positions only after the *Adler* decision. Thus the particular academic freedom claims of higher education, which are central here, could not have been raised in the earlier case. As a further section of this brief will indicate, these claims are of an even higher constitutional order than the claims which can be made for other public employees.

The final difference concerns the clarity and immediacy with which the constitutional issues are presented. Although the majority of the Court felt in 1952 that the constitutional claims were properly before it, no proceedings had yet been instituted under the Feinberg Law. Justice Frankfurter, dissenting, stressed what must have been apparent to all members of the *Adler* court: "These teachers do not allege that they have engaged in proscribed conduct or that they have any intention to do so. They do not suggest that they have been, or are, deterred from supporting causes or from joining organizations for fear of the Feinberg Law's interdict .... They do not assert that they are threatened with action under the law, or that steps are imminent whereby they would incur the haz-

ard of punishment for conduct innocent at the time, or under standards too vague to satisfy due process of law." 342 U.S. at 504 (Frankfurter, J., dissenting). It is clear that the majority of the *Adler* Court considered the constitutionality of the law only as a shell, with no evidence or indication as to the direction of its application, or even whether it would be invoked against any particular teachers. *Adler* went no further than to find the Feinberg Law, on its face, capable of a constitutional application. All questions concerning the procedure for listing particular "subversive organizations," the effect of such listing on the academic community, the procedures for disqualification and dismissal, were necessarily deferred to a later time. It is those questions which are now before this Court. The immediacy and concreteness so lacking in *Adler* have now been provided.

The facts of the present case tell much about the application of the Feinberg Law and its probable effect on the New York academic community. The five plaintiffs in the present case are, in Justice Frankfurter's words, "threatened with action under the law." They do claim that "steps are imminent whereby they would incur the hazard of punishment for conduct innocent at the time, or under standards too vague to satisfy due process of law." One plaintiff (Starbuck) has been dismissed outright for refusal to answer certain questions about his past political activities and associations. Two others have been notified that, although they remain in the University's employ during the pendency of this case, dismissal proceedings will be commenced at once if the statute is sustained. The term of one other appellant has not been renewed, apparently because of his refusal to sign the certificate which the law formerly required.

In addition, initially there were with respect to various appellants salary losses, promotional slow-downs, and cancellation or failure to receive appointments to teach additional evening school classes. In none of these instances has there been any charge of disloyalty or membership in a proscribed group. The disabilities incurred by these appellants derive solely from their unwillingness to sign a certificate which appears to jeopardize them and their political activities. Thus the present case brings to this Court a record describing the very kind of concrete application and "imminence" of threat which were so obviously lacking in 1952. It is no longer possible to judge the statutory complex merely on its face. Even if it may once have been capable of an application innocuous to academic and associational freedom, events since *Adler* have removed that possibility and squarely presented a host of constitutional issues which were only conjectural when this statute first came before the Court.

II. THE FEINBERG LAW DEPRIVES NEW YORK TEACHERS OF ACADEMIC AND ASSOCIATIONAL FREEDOMS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS.

A. A Major Premise of Adler—That Public Employment May Be Conditioned on the Virtual Surrender of First Amendment Freedoms—Has Been Clearly Rejected by Subsequent Decisions of this Court.

The majority in *Adler* refused even to consider the claim that the Feinberg Law imposed an "unconstitutional condition." A major premise of the decision was the proposition that public employment, including academic employment, may be conditioned upon the relinquishment of liberties which could not be abridged by direct government action. The teachers involved in that case, observed Justice Minton, "may work for the school system upon the reasonable

terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." 342 U.S. at 492. Later the Court added that a teacher who was denied a public school position on political grounds "is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that that limitation is inherent in every choice." 342 U.S. at 493.

Recent decisions of this Court make clear that applicants for public employment cannot constitutionally be put to that choice. The Court of Appeals, in the earlier phase of this very case, remarked how little remained of *Adler* in this regard: "However, the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian* v. *Board of Regents,* 345 F.2d 236, 239 (2d Cir. 1965). Within a year of the *Adler* decision, in fact, this Court all but repudiated *Adler's* central premise. In *Wieman* v. *Updegraff,* 344 U.S. 183 (1952) the dispute centered about the requirement of scienter in a state loyalty oath. The Court found it unnecessary to consider whether there was an abstract constitutional "right" to public employment. But there was no doubt that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U.S. at 192.

Later constitutional decisions have refined and reinforced the principle that government benefits may

very seldom be withdrawn or denied on condition of the surrender of constitutional liberties. Several later cases involving public employment have underscored this principle. *Slochower* v. *Board of Higher Educ.*, 350 U.S. 551 (1956); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964). In addition, the principle of the unconstitutional condition has been carried beyond public employment to other forms of government benefits, including membership in the bar, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957); and the holding of a notary public's commission, *Torcaso* v. *Watkins*, 367 U.S. 488 (1961). Perhaps the most dramatic application of the unconstitutional condition doctrine came in the recent case of *Sherbert* v. *Verner*, 374 U.S. 398 (1963). That case concerned the religious liberties of an applicant for unemployment compensation, unable to accept an available six-day job because her devout adherence to the Seventh Day Adventist faith precluded Saturday employment. There was no claim that the unemployment benefits were in any sense her constitutional "right." Indeed, her claim was of a somewhat lower order than that of the seeker of government employment. But she could not, the Court concluded, be constitutionally compelled to choose between the government benefit she sought and the completely free exercise of her religion. The Court equated the effects of direct and indirect restriction of first amendment freedoms: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." 374 U.S. at 404. After considering the effect which the denial of a particular benefit might have upon the appellant's worship, the Court con-

cluded: "To condition the availability of the benefits upon the appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." 374 U.S. at 406. Since this decision, there can be no question that the Court has rejected *Adler's* prominent distinction between direct and indirect abridgments of first amendment liberties. Nothing remains of *Adler's* casual assumption that a school teacher sacrificed no constitutional liberties by taking the oath because he was always free to forgo the public school teaching position in order to keep his friends. At least since *Sherbert,* and probably since *Wieman,* indirect state restrictions of this sort must be judged as rigorously as direct infringements of the constitutional liberties which they affect.

If anything remains of the rationale of *Adler,* it might be well to consider why conditions on government benefits should be judged as critically as direct regulation. Why, after all, if the government has the unqualified power to refuse (or perhaps to withdraw) public employment and lesser benefits, does it not possess, a fortiori, the power to impose virtually any condition or qualification? Does not the greater power, in short, necessarily comprehend the lesser power? There are several answers to the argument, which effectively refute *Adler's* assumption. First, it is far from clear that the conditioning power is in fact a "lesser" power than unconditional denial or withdrawal of the benefit. The very fact of attaching the conditions, or the giving of reasons, is likely to deter behavior or affect conduct in ways and to a degree that the unconditional or unexplained denial of benefits cannot do. In this sense, then, the effect of the conditioning power may be far wider and far more inhibitory than the effect,

or even the arbitrary exercise, of the power to deny or withdraw without giving any reasons. Thus it may well be that the conditioning power is the greater power; if so, the premise of the "greater-includes-the-lesser" argument falls at the threshold.

Even if it be assumed that the conditioning power is a lesser exercise of the greater power of denial or withdrawal, the logic of the argument is unsound. Long before *Adler,* Justice Brandeis, dissenting in a case involving conditioned access to postal privileges, observed that "grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatever. . . . Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated." *Milwaukee Social Democratic Publishing Co.* v. *Burleson,* 255 U.S. 407, 430-31 (1921). A half century ago, too, Professor Thomas Reed Powell showed that the logic of the opponents of the unconstitutional conditions argument proved too much, and had been rejected elsewhere: "A person without any right to claim his life from the government is still protected by constitutional guarantees against other deprivations." Powell, The Right To Work For the State, 16 Colum. L. Rev. 99, 108 (1916). Recent decisions of this Court reinforce Powell's observation. For example, the power to execute a convicted criminal surely does not subsume the "lesser" power to put him to death through slow torture. Nor does the governmental power to execute a wartime deserter necessarily include the "lesser" discretion to deprive him of his nationality, even after formal proceedings. *Trop* v. *Dulles,* 356 U.S. 86 (1958). Outside the constitutional context, the "greater" power does not always compre-

hend the "lesser"; the employer's undoubted right to close down his business altogether does not permit him to close down part of the business or to take other less drastic measures when his aim is to thwart labor organization efforts. *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965). These and other cases suggest what should by now be clear: to the extent *Adler* rests upon the notion that government can condition or qualify public employment at will because it could deny or withdraw such employment unconditionally, it is no longer constitutionally tenable. With this principle established, it now remains to evaluate the Feinberg Law, in its present application, according to constitutionally proper criteria.

B. The Freedom of Inquiry and Association Within the Academic Community Has Received A High Order of Constitutional Priority.

The *Adler* decision not only rejected the unconstitutional conditions argument; it also implicitly rejected the special recognition which was being sought for the freedom of the academic community. The Court insisted that the state's security interests outweighed the interests of the individual teachers in free inquiry and association: "In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate." 342 U.S. at 493. We contend that subsequent decisions have steadily enhanced the weight and dignity of academic freedom in the constitutional balance, and that the state interest given such deference in *Adler* can no longer be so casually recognized as paramount.

The development of constitutional recognition for academic freedom proceeded apace soon after the *Adler* decision. The following year, in *Wieman* v. *Updegraff,* the Court concluded that the First and Fourteenth Amendments protected "all persons, no matter what their calling," from subjection to excessive or unreasonable loyalty-security tests. But Justice Frankfurter, in his concurring opinion, added that "in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, in the case of teachers, brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." *Wieman* v. *Updegraff,* 344 U.S. 183, 195 (1952) (concurring opinion).

Soon other members of the Court gave official recognition to the constitutional stature of academic freedom. In *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250-51 (1957), the holding concerned only the state's power to compel disclosure of various political activities, and the content of a lecture given by a visitor to a state university campus. But Chief Justice Warren, for the plurality, went much further: "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straitjacket upon the intellectual leaders in our

colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." 354 U.S. at 250. Justice Frankfurter, in an important concurring opinion, added his staunch belief in the essentiality of academic freedom: "These pages need not be burdened with proof, based upon the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor." 354 U.S. at 262 (concurring opinion).

Subsequent decisions have given even greater recognition and prominence to the constitutional interest in academic freedom. In public elementary and secondary education as well as in higher education, this Court's recent decisions involving loyalty and security measures have consistently recognized the need to protect the liberty of teachers and scholars to inquire, to investigate, to associate with others, and to pursue the studies in which they are interested and for which they are qualified without fear of governmental censorship or disability. Such decisions as *Shelton* v. *Tucker*, *Cramp* v. *Board of Public Instruction*, *Baggett* v. *Bul-*

litt, 377 U.S. 360 (1964), and most recently *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966), unite around this common theme of constitutional protection of academic freedom. While these decisions may well protect the rights of all public employees, and not only of academic personnel, the most important constitutional principles have been developed in the academic setting; it is there that the constitutional protections are most needed. Academic freedom, as Henry Steele Commager has recently observed, "is guaranteed to the scholar so that he can engage, fearlessly and vigorously, in pushing outward the boundaries of knowledge in every field." "It is guaranteed to the scholar so that he can train new generations of technicians and public servants who will freely exercise their intelligence on behalf of their society." Ammager, Is Freedom an Academic Question, Saturday Review, June 20, 1964, 54, 56.

C. The Feinberg Law Unconstitutionally Abridges Liberties of Expression and Association Protected by the First and Fourteenth Amendments.

It may well be, as *Adler* held, and as the Court below reaffirmed, that a state has a valid interest in barring certain persons from public employment—even in colleges and universities—on the basis of their advocacy and political activities or associations. We contend, however, that only a very narrow range of expression and activity, defined and proved according to rigorous standards, can constitutionally be used to disqualify such persons. And we contend that New York's definitions and procedures are defective in several respects when judged by those strict standards: first, because the Feinberg Law disqualifies an applicant on the basis of mere knowing membership in certain political groups;

second, because the statutory standards of disqualification are impermissibly vague and uncertain; and third, because New York's interest in protecting the schools and colleges from subversion can, and therefore must, be vindicated by less onerous means.

1. *The Feinberg Law creates an unconstitutionally broad standard of disqualification.* There is some uncertainty about just what advocacy and activities do disqualify a person for public employment in New York. But this much is certain: The scope of the proscription is far broader than is permitted under the recent decision of *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966). For example, one who organizes or helps to organize or even becomes a member of a society or group of persons which teaches or advocates the violent overthrow of the Government or any subdivision thereof, is thereafter barred from public employment (Civil Service Law § 105 (1) (c)). This proscription operates without regard to the degree of the individual member's activity in the organization. It takes no account of the member's purpose in joining such a group; no opportunity is afforded the individual member to show that he joined the organization for the furtherance of its lawful activities, or to obtain further information about it. In short, the New York law draws no distinction whatever between the leaders of the group, who may be bent on subversion and who use the organization for that purpose, and its rank and file members who may well have quite different, and wholly lawful, reasons for belonging.

This is precisely the kind of indiscriminate classification that *Elfbrandt* v. *Russell* forbids. Whatever doubt may have remained since *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957) about the power

to disqualify persons on the basis of mere membership in organizations with unlawful aims, none could survive *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964), and *Elfbrandt* v. *Russell, supra.* It is now clear that only active membership, with a specific intent to further the organization's unlawful goals, may be used to disqualify. That is, nothing less than the degree of association for which one may be criminally prosecuted, *Scales* v. *United States,* 367 U.S. 203 (1961), will bar him from public employment, state or federal. (Although *Elfbrandt* involved only the constitutionality of a particular form of oath, and not the ultimate question of Arizona's power to deny employment on such grounds, *Aptheker* resolves any doubts about such a distinction. For in *Aptheker,* the ultimate issue of government's power to deny or withdraw the right to travel abroad on the basis of mere knowing Communist Party membership was squarely before this Court. There was no suggestion that a legislative declaration of disability on the basis of political association would have fared better than the procedure involved in *Elfbrandt.* No recent decision has suggested—at least so long as the burden of proof rests on the applicant—that an unconstitutional standard of disqualification could be saved by varying the form in which it is imposed. And if the legislative declaration was invalid in *Aptheker,* that result should follow *a fortiori* here, because public employment (especially in teaching) would appear to enjoy at least as high an order of constitutional protection as foreign travel. Thus the present case cannot be distinguished from *Elfbrandt* by any formal difference in the disqualification procedure.)

Other provisions of the Feinberg Law also seem in conflict with *Elfbrandt.* Principally, there are the provisions directed explicitly at Communist Party mem-

bership. Both the regental action of 1953 and the legislative ratification of 1958 listed the Communist Party of the United States and of New York as a "subversive" organization to which New York state employees might not belong. Conceding that the statute requires proof of *knowing* membership, there is still no basis for reconciling these provisions with *Elfbrandt*. Nothing is said, or suggested, about active membership, or specific intent to further the Party's unlawful aims. Thus the Communist-disqualification provisions of the law would appear clearly invalid under the recent decisions of this Court.

The only possible distinction derives from the fact that the Feinberg Law's Communist provisions only make Party membership "prima facie evidence" of disqualification. The regulations provide that such membership, once proved or admitted, is presumed to continue to the present, "in the absence of a showing that such membership has been terminated in good faith." It is true that the employee or applicant disqualified on such grounds may seek a hearing, and that the ultimate burden of sustaining the order is upon the officials seeking the discharge or disqualification. But during the pendency of the proceeding the employee or applicant must be suspended without pay (with restitution to be made if he prevails on the merits). And as the New York Court of Appeals noted in the *Adler* case, the hearing procedure only affords "an opportunity to present substantial evidence contrary to the presumption sanctioned by the prima facie evidence. . . ." *Thompson* v. *Wallin*, 301 N.Y. 476, 494, 95 N.E.2d 806, 815 (1950). Thus even in those cases where past political activities or associations merely create a presumption, or provide *prima facie* evidence of disqualification, the burdens incurred by the individual are heavy. The price of such an

imposition may well be either withdrawal from a position for which the individual may be fully qualified, or the reluctant abandonment of political associations and activities for which he could not constitutionally be punished or penalized directly. Here, as in *Speiser* v. *Randall,* 357 U.S. 513 (1958), the fatal vice of the only hearing procedure available to the applicant is that "the man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct must steer far wider of the unlawful zone than if the State must bear these burdens." 357 U.S. at 526.

Thus to the extent that the Feinberg Law makes certain political activities and associations *per se* grounds for disqualification or removal from public employment, it squarely conflicts with *Elfbrandt* v. *Russell.* To the extent that the law makes other associations merely *prima facie* evidence of disqualification, it relies upon a procedure—to transform inference into certainty—which places upon the applicant burdens that *Speiser* v. *Randall* bars.

2. *The Proscriptive Language of other Sections of the Feinberg Law is Unconstitutionally Vague and Uncertain.* To this point we have considered only those provisions of the Feinberg Law which rather specifically enumerate the grounds for disqualification. In addition, there are sections which describe the disqualifications in vague and ambiguous terms. These provisions, too, are unconstitutional on the quite different ground that their vagueness deters or is likely to deter much conduct that is constitutionally protected along with conduct which the state can constitutionally regulate. A few illustrations of the statute's sweep will support the argument.

Here, as in *Baggett* v. *Bullitt*, 377 U.S. 460 (1964), and *Cramp* v. *Board of Public Instruction, supra,* the applicant or employee is left in doubt about what he may not do if he wishes to obtain or retain public employment. The terms of the statute cover, for example, any person who "edits . . . any book . . . containing . . . the doctrine that the government of the United States . . . should be overthrown by force . . . and who . . . embraces the . . . propriety of adopting the doctrine contained therein. . . ." (Civil Service Law, § 105 (1) (b). Any scholar who edits a journal for which contributions are received from Communist countries, may reasonably wonder whether the contents of the publication could combine with some evidence of his own political views to forfeit his public employment.

Even more ominous for the conscientious public employee is the ambiguous effect of the language of sections 160 and 161 of the Penal Law, which enter the loyalty complex through Civil Service Law § 105(3). That section proscribes the utterance of treasonable or seditious words, or the doing of seditious or treasonable acts during the term of public employment. The Penal Law definition of "treason" is fairly precise; it is the definition of "sedition" (equated with "criminal anarchy") which raises the problems of uncertainty. "Seditious act" would appear to include, for example, carrying on a public street a copy of the Communist Manifesto: One is penalized who "publicly displays any book . . . containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means. . . ." (Penal Law, § 161 (4)). It is a crime in New York, and declared to be a "seditious act" for these purposes, to advocate, advise or teach "by word or mouth or writing. . . the duty, necessity

or propriety of overthrowing or overturning organized governments by force or violence. . . ." One commits a seditious act if he "openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing" not only of an officer of the United States Government, but of "any state or any civilized nation having an organized government. . . ." Finally, and perhaps most seriously, the statute declares "seditious" and thus a basis of ineligibility for public employment, the activity of any person who "organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such a doctrine [of violent overthrow or assassination]." (Penal Law § 161(4)). The possible scope of such language is limitless; the fact that its probable scope or actual history of application may be much narrower, does not save it. For, as this Court declared in *Baggett* v. *Bullitt,* in striking down provisions of an oath no vaguer than those of the New York law: "It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted for knowing but guiltless behavior nevertheless remains. . . . Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law. Nor should we encourage the casual taking of oaths by upholding the discharge or exclusion from public employment of those with a conscientious and scrupulous regard for such undertakings." 377 U.S. at 373-74. Here precisely the same arguments apply, save for the constitutionally unimportant distinction that the sanction here is loss of employment, together with criminal liability

for the substantive violation, rather than prosecution for perjury. However improbable or implausible it may seem that New York officials would disqualify any present or prospective public servants on the basis of any of the vast range of activities and associations theoretically covered by the provisions just discussed, the bare possibility is sufficiently reinforced by the continued presence of such sweeping language in the statutes. Indeed, it is significant that the vaguest, most offensive terms were built into the law as recently as 1958, in an attempt to supply meaning for the already imprecise categories concerning "treason" and "sedition." Ironically, the attempt to narrow the law's scope only served to broaden its possible application; the sweep of the definitional sections is wider than any reasonable interpretation of the words they attempt to define.

A further ambiguity arises from the presence of the very same key terms—"seditious" and "treasonable"—in Education Law § 3021, but without the definitional reference to the Penal Law. Significantly, the constitutionality of that section was not before the Court in *Adler* and has not previously been passed upon. The two key words found in both sections are hardly specific when standing alone. Nor, as we have seen, do they acquire specificity when defined by reference to other, equally vague statutes. But the absence of any attempt to define these words in the old Education Law section serves only to underscore their vagueness: Should the Penal Law sections be incorporated here also by implication, or should the same words in the other statute be given a different meaning? Any civil servant may reasonably wonder about the quandary in which this curious lack of symmetry places him.

3. *New York's Interest in Protecting Its Educational System From Subversion Can, and Therefore Must, Be Served Through Less Onerous Means.* In determining the constitutionality of the provisions we have considered, it is relevant whether or not less onerous means are available to serve the same objectives. Recent decisions of this Court have stressed that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker,* 364 U.S. 479, 488-89 (1960); see also *Aptheker* v. *Secretary of State,* 378 U.S. 500, 512-14 (1964). In the case of a state loyalty-security program such as the one now before the Court, the availability of less drastic means should be apparent. Indeed, the very presence of criminal laws proscribing "criminal anarchy" and "treason" suggests the avenue of solution (although the particular language of these provisions in New York may well not pass constitutional muster). Most states have direct regulatory laws, designed either to prevent the use of positions of public trust for subversion of the government, or to discharge people who engage in advocacy that creates a clear and present danger. Whatever valid interests New York may have in proscribing such activities seem to be fully and adequately served by the provisions of the Feinberg Law covering those activities. But to the extent that the Feinberg Law goes further, it transcends the legitimate interests of the state at the expense of individual liberties. Even if more drastic regulation may sometimes be justified in the absence of other sanctions, the justification falls when less onerous means are not only theoretically available but actually exist.

III. THE FEINBERG LAW INVOLVES AN UNCONSTITUTIONAL BILL OF ATTAINDER.

We have already argued that the provisions of the Feinberg Law which make Communist Party membership, as such, evidence of disqualification, violate the First and Fourteenth Amendments. We also contend that these provisions constitute a bill of attainder. There can be no question that loss of or disbarment from public employment is a sufficient penalty, when visited upon persons specified in a statute, to evoke the attainder clause; criminal sanctions are not prerequisite to making such an argument. Indeed, in the earliest attainder cases in this Court, the sanctions included loss of employment and professional practice. *Cummings* v. *Missouri,* 71 U.S. (4 Wall.) 227 (1867); *Ex Parte Garland,* 71 U.S. (4 Wall.) 333 (1867). The more recent case of *United States* v. *Lovett,* 328 U.S. 303 (1946), found a bill of attainder in the denial of compensation for government employment, obviously less drastic a sanction than the outright denial of a civil service position. Despite occasional suggestions to the contrary, no case has drawn a distinction between the imposition of criminal penalties and the deprivation of employment as the mark of a bill of attainder if the other conditions of such a bill are met.

Since the sanctions involved here are sufficient to invoke the attainder clause, the case becomes virtually indistinguishable from *United States* v. *Brown,* 381 U.S. 437 (1965). Here, as there, the critical fact is that disqualification is based solely upon a legislative determination that Communist Party members should be denied a particular government benefit (here government employment; there the right to hold positions of leadership in NLRB-certificated labor unions). The disqualification applies to a particular class of per-

sons, designated by affiliation if not by name. Although Communist Party membership was first made a basis for disqualification by the New York regents, the critical fact is that the designation was eventually incorporated into the statute. Thus the bar which is operative today is the decree of the legislature and not of the regents. Moreover, even if the regental judgment were still operative, the case would fall within *Brown;* for the critical element which transforms a mere disqualification into an attainder is the infliction of punishment or penalties without any judicial determination of guilt or disqualification. Thus it makes little difference whether the operative decision was that of the regents or the legislators.

The specific designation of Communist Party membership as the basis of disqualification serves to distinguish the present case from others in which attainder arguments have been rejected. In *Garner* v. *Board of Public Works,* 341 U.S. 716, 722-23 (1951), involving a municipal loyalty test, the Court was careful to point out that the disqualification attached to a broad range of affiliations, defined in terms of the nature and activities rather than the names of proscribed organizations. Similarly, it was the Congressional reluctance to name the Communist Party as the proscribed group that saved certain portions of the Internal Security Act of 1950 from invalidity on attainder grounds. *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 82-88 (1961). The difference between those cases and *Brown* makes clear on which side of the line the present case falls; for here it is the Communist Party that is singled out by name for disqualification. The rationale of the difference is indicated by the reasoning of the *Brown* majority, and is equally applicable here: To deprive a person of a

government benefit on the ground of membership in a named group creates a classification defective in two respects; it is both under-inclusive and over-inclusive at the same time. It is under-inclusive because it fails to proscribe membership in other groups that may create similar threats, and even precludes the possibility of extending the proscription if conditions change. At the same time, such a classification is over-inclusive in that it presumes all members of the named organization pose the threat to which the proscription was aimed; it takes no account of the degree of their individual activity or adherence to the organization's illegal aims. Thus, while the same objective might be achieved through an open-ended classification, the designation of a particular organization places the disqualification precisely under the attainder clause.

CONCLUSION

An outstanding commentator has, in the very context of the implications of community action and pressures relating to the problem of alleged subversives in higher education, recently emphasized that the university is the only institution in Western society whose business it is to search for and transmit truth regardless of all competing and conflicting pressures and demands, and as such is the chief instrument whereby society provides itself with a continuous flow of ideas and with independent criticism and advice. Commager, *The Nature of Academic Freedom, Saturday Review,* August 27, 1966, 13, 36-37. He proffers the conclusion that, if the academy is to perform its special obligation to act as the critic and conscience of society, it must be free to fix its own standards and determine its own credentials, and must be protected from the consequences of substituting irrelevant and pernicious

criteria for professional ones in the selection of its members.

It is respectfully submitted that the Feinberg Law and its administrative machinery are incompatible with these considerations and conflict with the essential function and obligation of the university. On the basis of the argument as developed in this brief, it is further submitted that the Law and its machinery are inconsistent as well with key constitutional principles and objectives.

Respectfully submitted,

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